SERVED: May 22, 1992

NTSB Order No. EA-3564

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 30th day of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

SHANE BERG,

Respondent.

Docket SE-10095

OPINION AND ORDER

Both respondent and the Administrator have appealed from the initial decision issued by Administrative Law Judge William R. Mullins on November 2, 1989, following an evidentiary hearing.[1] The Administrator replied to respondent's appeal. We deny respondent's appeal and grant that of the Administrator.

The proceeding was initiated by a March 14, 1989 order of suspension (complaint), in which the Administrator alleged that respondent had violated sections 91.87(h), and 91.9 of the

[1]The initial decision and order, an excerpt from the transcript of the hearing, is attached.

Federal Aviation Regulations ("FAR"), 14 CFR Part 91.[2]

Respondent was also charged with violating § 91.75.[3] The

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[2]Section 91.9 (currently 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 91.87(h) (currently 91.129(h)) provided, as pertinent:

> Clearances required. No person may, at an airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC [Air Traffic Control]. . . .

[3]The Notice of Proposed Certificate Action claimed a violation of § 91.75(a), but in describing the violation apparently used the wording of subparagraph (b). Tr. at p. 4. The Order of Suspension made the wrong correction. Instead of correcting the citation to notice a violation of subparagraph (b), it continued the (a) citation and revised the discussion to reflect subparagraph (a)'s language. Id. The law judge granted the Administrator's motion to amend the complaint to correct the charge to subparagraph (b). In his appeal, respondent seeks dismissal of the entire complaint based on this procedural irregularity.

We affirm the law judge's decision and decline to dismiss either in whole or in part. Dismissal of the other charges is obviously not warranted as, at most, the error extends only to the § 91.75 claim. As to that, we find the error to have been harmless.

Subparagraph (a) prohibits pilots from deviating from clearances that have been obtained from ATC, and requires pilots immediately to clarify the meaning of clearances when their meaning is uncertain. Subparagraph (b) reads: "Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised." As the Administrator notes, the complaint (¶ 4) charges respondent with operating "contrary to the instruction from ATC." This use of the subparagraph (b) language, the fact that the citation discrepancy is only within subparagraphs of a single rule, and respondent's awareness, since the investigation began, of the matters of interest to the FAA convinces us that respondent had adequate notice of the § 91.75 charge. Therefore, dismissal of it is unwarranted.

Administrator suspended respondent's airline transport pilot certificate for 30 days.

The incident giving rise to the complaint occurred on September 4, 1987, as a result of respondent's departure from Houston's Hobby Airport, piloting Cessna N3426Q. Although the cause of the incident is the subject of this proceeding, its results are undisputed. Respondent took off prematurely (prior to actual clearance) and ATC was required to divert other departing and arriving aircraft.

The tape and transcript of respondent's conversations with ATC demonstrate that the takeoff clearance was given to another aircraft. The end of the pertinent transmission was "runway two two cleared for takeoff." Exh. A-3, p. 2. That aircraft's response was "Runway heading." Id.

Respondent, however, contends that, at the time he heard a takeoff clearance directed to him, and worded as "26 Quebec clear for takeoff," he acknowledged it with "Roger 26 Quebec," and that any misunderstanding was a result of radio malfunction or the controller's failure to clarify the situation. Respondent suggests that his response to the tower either was not received due to his radio problems or was squelched by the concurrent response of the other aircraft (the one to whom the clearance had been directed). Respondent claims his failure to hear the controller's subsequent abort instruction was the result of radio malfunction.

The law judge, after reviewing a transcript of the relevant

communications and listening to the ATC tape, did not credit respondent's testimony regarding the ATC communications:

> [E]ven if your radios are not working or are not working properly, there is going to have to be some transmission into that radio for some message to come out of it that says 26 Quebec cleared for takeoff. And there is nothing in the tower tape, there is nothing in any of the evidence that would suggest that that transmission was made except the testimony of the Respondent that he heard it that day.

Tr. at p. 92.

The law judge rejected respondent's suggestion that the FAA had tampered with the tape by removing the squelch respondent alleged to have heard on the original.[4] The judge concluded that respondent had the duty to be "absolutely sure" of his clearance. Given that no clearance was issued, respondent was found to have violated the cited regulations. In light of the possibility of a radio malfunction, respondent's suspension was reduced, however, to 20 days.[5]

In addition to the procedural claim we have already resolved, respondent argues that the initial decision erred as a result of the law judge's misunderstanding of the radio failure. However, respondent's premise --that a mechanical failure, if beyond his control, would be an affirmative defense -- is

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[4]Implicitly, therefore, the law judge also rejected respondent's statement that he acknowledged the clearance but the acknowledgement was squelched. Respondent was the only one to claim that the tape heard at the hearing (missing the alleged squelch) was not the same as the one he heard earlier. Not only did the involved controller dispute the charge, there is no independent forensic evidence to corroborate it.

[5]It is this aspect of the decision that has been appealed by the Administrator.

inaccurate, and the law judge's decision is supported by the record.

The law judge properly framed the issue: it is the pilot's responsibility to be absolutely sure to comply with ATC instructions. Respondent offers no support for the general proposition that unintentional acts or omissions justify dismissal of proven safety violations, and we are aware of none that would be relevant here.[6]

Respondent does not contend on appeal that a clearance actually was given. Absent one, there can be no finding other than that of the law judge. By taking off without a clearance, respondent violated § 91.87(h), violated 91.75(b) (in departing from the instruction to taxi into position and hold), and violated 91.9. Respondent's explanation for his action affects, at most, the sanction to be imposed.

In this regard, we reject respondent's suggestion that the circumstances warrant reduction or elimination of the 20-day suspension imposed by the law judge. Instead, we grant the Administrator's appeal and reinstate the 30-day suspension. Our decision is colored by our view that respondent did not proceed

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[6]See, e.g., Administrator v. Mohumed, NTSB Order EA-2834 (1988) (faulty radio and misunderstanding ATC instructions are not affirmative defenses; "the Board believes there is deterrent value when sanctions are imposed even for unintentional violations"). But see Administrator v. Finley, 3 NTSB 2840 (1980) (where there were other contributing causes of an unauthorized crossing of a taxiway, including ATC's extended tacit approval of respondent's procedure and lax traffic control, mitigation of sanction is an inadequate remedy; complaint dismissed).

with sufficient care.

Respondent's letter to the FAA (Exhibit A-2) indicates that there was considerable noise in the cockpit. This testimony was not contradicted at the hearing.[7] Not only was the cockpit "very loud" but his passenger, the owner of the aircraft, "began talking even louder." Exh. A-2 at 2. Respondent had only flown this aircraft once before. The passenger (whom respondent had never met) was explaining the complexities of the engines. In such circumstances, a pilot might not give the necessary attention to radio communication.

Moreover, to reduce the sanction would require us to rely on respondent's unsubstantiated theory of events, which does not hold up under close scrutiny. Under this theory, simply too many different things go wrong after respondent mishears the clearance. As the law judge found, there is no support in the record for respondent's contentions: 1) that he answered the clearance with his call sign; 2) that this answer was squelched; and 3) that the squelch was removed from the tape. In light of this, we have difficulty crediting the additional contention that the radio malfunctioned at the instant the controller issued his

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[7]Respondent did not appeal the law judge's failure to strike Exhibit A-2 and, therefore, we have reviewed the letter as part of the record. In a number of respects, it is more detailed than respondent's hearing testimony. Although the law judge found the differences between the two versions of events insubstantial, one cannot ignore the fact that the earlier letter contains a version of events less favorable than respondent's position at the hearing.

warning to abort the takeoff.[8]

The Administrator correctly notes that, to reduce the sanction, the law judge was required to identify clear and compelling reasons. Administrator v. Musquiz, 2 NTSB 1474 (1975). In the circumstances, we also agree with the Administrator that giving respondent the benefit of the doubt that, at critical times, the radio malfunctioned in the manner alleged (as the law judge did) is not such a clear and compelling reason.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's appeal is granted;

3. The 30-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.[9]

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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[8]We note, but need not address further, respondent's incorrect claim that radio failure became an "accepted fact." The parties stipulated only that respondent "may have had radio problems." Similarly, the law judge's extending the benefit of the doubt on the issue speaks for itself; it is not equivalent to a finding of fact.

[9]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).